Supreme Court, U.S.
FILED
OCT 3 1 2003
OFFICE OF THE CLERK

No. 03-0496

In The

Supreme Court of the United States

CAROLINE ROGERS,

Petitioner,

v.

HORSESHOE ENTERTAINMENT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent, Horseshoe Entertainment, is a Louisiana Limited Partnership. New Gaming Capital Partnership and Horseshoe Gaming Holding Corporation own partnership interests in Horseshoe Entertainment.

Jack B. Binion owns 10% or more of the stock of Horseshoe Gaming Holding Corporation.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Authorities iii

Reasons For Denying the Writ 1

I. The Fifth Circuit Did Not Render an Opinion Regarding the Interpretation of the Venue Provision For Title VII and ADA Claims, 42 U.S.C. § 2000e-5(f)(3) 2

II. The Fifth Circuit Properly Reviewed the Ruling on the Motion To Transfer Venue Pursuant to 28 U.S.C. § 1404(a) 5

Conclusion 8

TABLE OF AUTHORITIES

Page

CASES:

Apache Products Co. v. Employer Ins. of Wassau, 154 F.R.D. 650 (S.D. Miss. 1994) 7

Bryant v. ITT Corp., 48 F. Supp. 2d 829 (N.D. Ill. 1999) 7

Chrysler Capital Corp. v. Woehling, 663 F. Supp. 478 (D. Del. 1987) 7

Dupre v. Spanier Marine Corp., 810 F. Supp. 823 (S.D. Tex. 1993) 7

Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970) 7

Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163 (S.D. Tex. 1994) 7

Hartford Fire Ins. Co. v. Westinghouse Elec. Corp., 725 F. Supp. 317 (S.D. Miss. 1989) 7

Hernandez v. Graebel Van Lines, 761 F. Supp. 983 (E.D. N.Y. 1991) 7

Icon Indus. Controls Corp. v. Cimetrix, Inc., 921 F. Supp. 375 (W.D. La. 1996) 7

Los Angeles Memorial Coliseum Comm'n v. NFL, 89 F.R.D. 497 (C.D. Cal. 1981) 8

Morgan v. Illinois Cent. R. Co., 161 F. Supp. 119 (S.D. Tex. 1958) 7

New Image, Inc. v. Travelers Indem. Co., 536 F. Supp. 58 (E.D. Pa. 1981) 7

Paul v. International Precious Metals Corp., 613 F. Supp. 174 (S.D. Miss. 1985) 7

TABLE OF AUTHORITIES – Continued

Page

Reiffen v. Microsoft Corp., 104 F. Supp. 2d 48 (D. D.C. 2000) 7

Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240 (11th Cir. 1991) 4, 5

STATUTES:

28 U.S.C. § 1404(a) 1, 2, 4, 5, 7

42 U.S.C. § 2000e-5(f)(3) 1, 2, 3

Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* 1

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 1

REASONS FOR DENYING THE WRIT

The issue presented for review in the Petition for Writ of Certiorari is whether 42 U.S.C. § 2000e-5(f)(3), the venue provision applicable to claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (hereinafter "Title VII"), and the Americans with Disabilities Act 42 U.S.C. § 12101, *et seq.* (hereinafter "ADA"), permits a plaintiff to bring suit in *any* judicial district in the state of Louisiana without being subject to a motion to transfer pursuant to 28 U.S.C. § 1404(a). The Petition for Writ of Certiorari should be denied inasmuch as the issue is not ripe for consideration by this Honorable Court and the opinion rendered by the Fifth Circuit Court of Appeals does not conflict with decisions of other Circuit Courts of Appeals.

Petitioner filed suit in the United States District Court, Middle District Court of Louisiana. Respondent, Horseshoe Entertainment (hereinafter "Horseshoe"), filed a motion to transfer the litigation to the Shreveport Division of the Western District of Louisiana. After the motion was denied, Horseshoe filed a Writ of Mandamus, seeking review of the District Court's decision. The Fifth Circuit granted Horseshoe's Writ of Mandamus, and vacated the Middle District Court's denial of the Motion to Transfer Venue.

The Fifth Circuit's opinion expressly states that it simply assumed, "without deciding," that the Middle District Court of Louisiana was an appropriate venue. Nevertheless, pursuant to 28 U.S.C. § 1404(a), transfer of venue to the Shreveport Division of the Western District was appropriate. Since the Fifth Circuit made no decision regarding the interpretation of the language used in 42

U.S.C. § 2000e-5(f)(3), this issue is not ripe for consideration by this Court. Furthermore, Petitioner cites no authority to suggest that Plaintiff's choice of venue pursuant to 42 U.S.C. § 2000e-5(f)(3) is not subject to a motion to transfer venue pursuant to 28 U.S.C. § 1404(a). To the contrary, the venue provision at issue specifically references the applicability of 28 U.S.C. § 1404(a). The Fifth Circuit's ruling was proper. While it rendered no opinion regarding the interpretation of the language of the venue statute, the Court ruled that a transfer of venue was warranted pursuant to 28 U.S.C. § 1404(a). Therefore, Respondent respectfully urges that this Court deny the Petition for Writ of Certiorari.

I. THE FIFTH CIRCUIT DID NOT RENDER AN OPINION REGARDING THE INTERPRETATION OF THE VENUE PROVISION FOR TITLE VII AND ADA CLAIMS, 42 U.S.C. § 2000e-5(f)(3)

Petitioner erroneously asserts that the Fifth Circuit's opinion "establishes a new interpretation of the special venue statute of 42 U.S.C. § 2000e-5(f)(3) thereby fundamentally changing existing law affording Title VII plaintiffs the right to select the forum within the state." It did not. Rather, the Fifth Circuit specifically stated that it would not render an opinion as to the proper interpretation of the venue provision. Accordingly, this issue is not ripe for consideration by this Court.

Actions brought pursuant to Title VII and the ADA are governed by the following venue provision:

> [A]n action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed,

> in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e-5(f)(3). Petitioner alleges that since the alleged discrimination took place in the state of Louisiana, she is entitled to bring the action in any district within the state, relying on the language in the venue provision that "an action may be brought in any judicial district ***in the State*** . . . " Petitioner's broad interpretation of this phrase to include any district court in Louisiana as a proper forum is the only basis for asserting that venue is proper in the Middle District of Louisiana.

The Fifth Circuit, in ruling on the Petition for Writ of Mandamus, specifically stated that it would not decide whether the Middle District Court was an appropriate venue, thereby refusing to render an opinion as to the proper interpretation of the venue statute. The Court stated:

> The only basis upon which the Middle District Court could be a permitted venue under the Statute is the language which states:
>
> > "such an action may be brought in any judicial district in the State in which

> the unlawful employment practice is alleged to have been committed."
>
> Assuming, ***without deciding***, that the Middle District Court was an appropriate venue for Plaintiff's suit, we nevertheless conclude that the Middle District Court clearly erred and abused its discretion in denying Horseshoe's motion to transfer. (Emphasis added).

(Pet., App. A at 12a).[1]

Petitioner misrepresents the Court's opinion by stating that it conflicts with one Circuit Court decision, *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1248 (11th Cir. 1991), which held that venue is proper anywhere in the state in which the alleged conduct was committed. This is incorrect! The Fifth Circuit did not decide this issue, but instead looked to the District Court's evaluation of the motion to transfer pursuant to 28 U.S.C. § 1404(a). Likewise, because the Court rendered no opinion on the issue, this matter is not properly before this Honorable Court for review.

[1] The only language that Petitioner attempts to cite in order to demonstrate a decision by the Fifth Circuit on this issue was withdrawn by the Court. Petitioner cites a portion of the Fifth Circuit opinion that was withdrawn after consideration of the Petition for Rehearing, and this portion is not included in the opinion that was substituted. Since this language was withdrawn by the Fifth Circuit, it is not properly before this Court for review. (*See* Pet. at 16; Pet., App. A at 15a-16a).

II. THE FIFTH CIRCUIT PROPERLY REVIEWED THE RULING ON THE MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

In the Petition for a Writ of Certiorari, Petitioner argues (without supporting citations and for the first time during this litigation) that Title VII's venue provision should not be subject to a Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a), or that greater deference should be given to Plaintiff's choice of forum. Such an argument is contrary to the language of the statute. The venue provision for Title VII and ADA particularly references the applicability of 28 U.S.C. § 1404. The Fifth Circuit noted the reference to the provision governing transfer of venue for convenience of the parties and witness, stating "[w]e note that the last sentence of this special venue provision makes express cross-reference to §§ 1404 and 1406 of Title 28 indicating clearly Congress' intention that the provisions of §§ 1404 and 1406 would also be applicable in this case." (Pet., App. A at 7a). Indeed, even in *Richardson*, *supra*, the principal case cited by Petitioner favoring her interpretation of the venue statute, the Eleventh Circuit recognized that the district court "may transfer the case to another district where the suit could have been heard under section 1404(a)." *Id.* at 1248.

The Fifth Circuit properly reviewed and vacated the District Court's ruling. This action could have been brought in the Shreveport Division of the Western District of Louisiana. As recognized by the Fifth Circuit, the following facts are undisputed: (1) Plaintiff resides in Caddo Parish, Louisiana, which is within the Shreveport Division of the Western District; (2) Plaintiff was employed by Horseshoe in Bossier City, Louisiana, within the Shreveport Division of the Western District; (3) Plaintiff

was allegedly subjected to harassment and discrimination in Bossier City, Louisiana; (4) almost all witnesses for Plaintiff and Defendant reside in areas within the Shreveport Division of the Western District; (5) all employment records related to Plaintiff's employment are maintained within the Shreveport Division of the Western District; (6) but for the alleged conduct, Plaintiff would have continued to work for Horseshoe, which is within the Shreveport Division of the Western District; (7) the distance between Baton Rouge, Louisiana, where the Middle District Court is located, and the Shreveport/Bossier City area, is beyond the 100 mile distance in which the automatic subpoena power of a district court can be used to compel attendance of witnesses. (Pet., App. A at 2a-4a).

Despite these undisputed facts, the Middle District Court denied Horseshoe's Motion to Transfer Venue. The Fifth Circuit held that the Court erred in doing so for the following reasons: (1) the factor of location of counsel is irrelevant and improper for consideration, noting that the delay in ruling on the motion to transfer required Horseshoe to engage counsel in Baton Rouge, Louisiana; (2) the Court did not give significance to the factor of location of books and records; (3) the Court erred in considering and giving weight to the factor of possibility of delay or prejudice without clear and convincing evidence; and (4) the Court erred in attributing decisive weight to Plaintiff's choice of forum. (Pet., App. A at 10a-12a). The Fifth Circuit held that "the factors favoring transfer substantially

outweigh the single factor of the place where plaintiff chose to file the suit."[2] (Pet., App. A at 13a).

Petitioner maintains that it would be impossible to get a fair and impartial trial in Horseshoe's "back yard." Further, Petitioner suggests that Congress placed a higher burden on a motion to transfer venue pursuant to 28 U.S.C. § 1404(a) for Title VII and ADA claims, or that Plaintiff is given a "greater right" to choose the venue when asserting these claims. (Pet. at 2, 4, 10, 13, 14).

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[2] Plaintiff's choice of forum is not the controlling factor in determining whether the court can transfer the action. *Garner v. Wolfinbarger*, 433 F.2d 117 (5th Cir. 1970); *Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163 (S.D. Tex. 1994). In fact, courts must scrutinize a plaintiff's choice of forum more closely when the plaintiff does not live in the chosen forum. *See Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823 (S.D. Tex. 1993); *Apache Products Co. v. Employer Ins. of Wausau*, 154 F.R.D. 650 (S.D. Miss. 1994); *Paul v. International Precious Metals Corp.*, 613 F. Supp. 174 (S.D.Miss. 1985). Moreover, "deference [to plaintiff's choice of forum] is lessened when the operative facts of the dispute occur outside the plaintiff's chosen forum." *Icon Indus. Controls Corp. v. Cimetrix, Inc.*, 921 F. Supp. 375 (W.D. La. 1996). The so called "home turf rule" is substantially attenuated where plaintiff has commenced the action in a forum that is not her residence. In such cases, plaintiff's choice of forum is given much less weight in ruling on a discretionary transfer motion. *Bryant v. ITT Corp.*, 48 F. Supp. 2d 829 (N.D. Ill. 1999); *Hartford Fire Ins. Co. v. Westinghouse Elec. Corp.*, 725 F. Supp. 317 (S.D. Miss. 1989); *New Image, Inc. v. Travelers Indem. Co.*, 536 F. Supp. 58 (E.D. Pa. 1981). Likewise, a plaintiff's chosen forum will be accorded little deference where it is apparent that plaintiff is engaged in "forum-shopping" and is offered an equally convenient forum elsewhere. *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48 (D. D.C. 2000). Any deference given the plaintiff's choice evaporates when the lawsuit has no connection to the venue chosen. *See Morgan v. Illinois Cent. R. Co.*, 161 F. Supp. 119 (S.D. Tex. 1958); *Chrysler Capital Corp. v. Woehling*, 663 F. Supp. 478 (D. Del. 1987); *Hernandez v. Graebel Van Lines*, 761 F. Supp. 983 (E.D. N.Y. 1991).

Petitioner has offered absolutely no citation or support for such an argument. Moreover, Petitioner has not asserted any evidence of favoritism towards Horseshoe in the Western District. The mere ***perception*** that local jurors would be prejudiced is not a sufficient consideration in determining whether a transfer is appropriate. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 89 F.R.D. 497 (C.D. Cal. 1981).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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